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# Comment

## Between Law and Justice: Professor Bittker's *Case for Black Reparations*\*

HENRY J. RICHARDSON III\*\*

### INTRODUCTION

During a time when the United States is near the bottom of either an economic recession or depression, it may seem fanciful and even immoral to inquire seriously into the feasibility of paying reparations to black people. Such an attitude implies that in these difficult times even affirmative action programs are unwarranted luxuries, to say nothing of the insanity of black reparations when money is short for everybody. Professor Bittker was writing prior to the onset of present economic woes and may therefore be exempted from accusations of fantasy and immorality, though it is doubtful he would wish to be since he seeks to present reparations as a plausible idea. However, the authors of the subsequent mini-literature of reviews<sup>1</sup> that his work has generated have tended to support reparations in spite of a fuller awareness of the economic situation and, more importantly, they augment Professor Bittker's work in laying a foundation for clarifying and hopefully resolving the complex problems which he has designated as "the second American dilemma."<sup>2</sup> Accordingly, certain issues in this secondary literature will be explored briefly in conjunction with those raised by *Black Reparations*. Finally an issue not considered by any of the above—the acceptance of reparations—will be discussed.

From the perspectives of Afro-America, perhaps it would have been better if the first book-length legal analysis<sup>3</sup> of this subject had

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\* THE CASE FOR BLACK REPARATIONS. By Boris I. Bittker. New York: Random House, 1973. Pp. 191. \$7.95 [hereinafter cited as BITTKER].

\*\* LL.B. 1966, Yale University; LL.M. 1971, U.C.L.A.; Associate Professor of Law, Indiana University; Visiting Associate Professor of Law, Northwestern University, 1975-1976.

<sup>1</sup> Bell, Book Review, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 156 (1974); Guinier, Book Review, 82 YALE L.J. 1719 (1973); Jenkins, Book Review, 18 HOW. L.J. 247 (1973); Shepard, Book Review, 7 GA. L. REV. 587 (1973).

<sup>2</sup> BITTKER at 136.

<sup>3</sup> There have been, however, three comparatively recent legal analyses of this problem, the latter two by the same black scholar: Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063 (1968); Collins, *The United States Owes Reparations to Its Black Citizens*, 16

been published by a black legal scholar. Why such a consideration should enter the mind of a black legal scholar in the first place is based in suspicion that even the most objectively intentioned, methodologically balanced scholarship cannot overcome the context of historical and present racism against black people in America. This produces the further fear that the question of reparations, so much at the center of Afro-America's both inchoate and structured feelings towards America,<sup>4</sup> will be framed in a way prejudicial to those outcomes which black people feel are deserved, if it is not explored by some scholar touched at least somewhat in the same way. The history of black people in America has taught that such feelings and suspicions are not irrational emotional luxuries, but often comprise a perception, commonsense and scholarly, of social realities which majority America would have hidden. Such is the depth to which distrust between blacks and whites in this country has infiltrated.

The fact is, however, that *Black Reparations* has not been written by a black scholar. The fact is also that Professor Bittker has written a book which raises too many of the difficulties involved in implementing a reparations scheme to satisfy those who want reparations paid tomorrow, but which also sympathizes with the essential justice of the idea too much to satisfy people who view it as embodying the worst excesses of the modern welfare state. In other words, it is a most useful book, raising the legal issues in the fine tradition of scholarly balance.

It is a book about the law, and as such it may contribute to general and personally felt frustrations about the entire subject, notwithstanding personal commitments to legal scholarship. The idea of black people getting reparations for past wrongs—wronges taken by most Afro-Americans as a fact of present existence—is an idea of justice which, accordingly, transcends the legal process, though ideally the former parallels the latter. But to discuss reparations as an idea of justice within the framework of American law is necessarily to confine the idea in a cage of both tight and suspicious construction. It is tight because the precise and disciplined constraints of legal inquiry often exclude factors of power and wealth that shape legal process,<sup>5</sup> and suspicious because American criminal law, at least, has historically served and arguably continues to serve as much as an instrument of the

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How. L.J. 82 (1970) ; Collins, *The United States Owes Reparations to the African States for the Slave Trade*, 16 How. L.J. 314 (1971).

<sup>4</sup> See, e.g., authorities cited in note 3 *supra*; see generally D. BELL, RACE, RACISM AND AMERICAN LAW 562-63 (1973) ; Guinier, *supra* note 1, at 1720-21.

<sup>5</sup> Cf. Bell, *supra* note 1, at 157-58, 165.

oppression of blacks as it has been their protector.<sup>6</sup> Nor have other areas of American legal process been, from time to time, above suspicion in this regard. This suspicion must be retained as a sounding-board for all issues concerning reparations. Nevertheless, it is difficult to conceive that any possible system of reparations could ever be implemented nationally other than under legal process.<sup>7</sup> Since we are generally stuck with such inconveniences, it is better they should be raised systematically, as Professor Bittker has done.

*The Case for Black Reparations* is timely in the context of not only American happenings, but relative to current events in the international arena as well. Generally, this book discusses legal expectations about resource allocation between a "have" group, and a "have-not" group, specifically black people in America. The latter are not only an economically deprived American group, but they share this status of comparative deprivation with the majority of their kinfolk in African lands (or, for that matter, elsewhere). Establishing arrangements for just and effective resource allocation towards black people not only defines a frontier of legal expectations in America but also an analogous frontier in international legal process.<sup>8</sup> The Caracas Conference on the Law of the Sea in Spring-Summer 1974 and Summer 1975 in Vienna,<sup>9</sup> and the recent special session of the United Nations General Assembly on economic problems of the developing countries,<sup>10</sup> are only two particular international arenas, out of many, where the basic question of how much of the world's resources will be available to Africa and other developing lands is being systematically confronted. This question is further confronted in the context of a sudden shift of wealth to oil-producing countries (including Nigeria), raising questions as to how this redistribution of trade, aid, and influence might be arranged ac-

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<sup>6</sup> D. BELL, *supra* note 4, at 857-83.

<sup>7</sup> In this connection, however, the example of Woodstock returns to haunt us, in that over 200,000 people assembled for several days without disorder and exhibited a remarkable amount of cooperation. This raises the question as to whether the apparatus of legal institutions is necessary in all cases to carry out a social program, including black reparations. Bittker's response would seem to be (1) that the legal system is needed to redress the effects of "legally" imposed segregation, *see* BITTKER at 13-17; *cf. id.* at 95-96, and (2) that the law possesses adequate resources to do the job. Bell especially disagrees with (2), while noting that much present affirmative action federal court-ordered relief might now be viewed as "quasi-reparational." Bell, *supra* note 1, at 164.

<sup>8</sup> *See generally* Richardson, *Speculations on the Relevance of International Law to the Needs of Black Southern Africa*, 1 UFAHAMU, Spring 1970, at 22; *see also* Collins, *supra* note 3, at 314; *cf. BITTKER* at 86, 87.

<sup>9</sup> *See* Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975).

<sup>10</sup> *See* 11 UNITED NATIONS MONTHLY CHRONICLE, May 1974, at 33, 66-84.

cording to legal expectations and duties. Reparations-type arguments, on the basis of alleged past corporate wrongs and excessive profits, have been made in some third world countries, by the way of set-off claims, and in negotiations over the amount of compensation the nationalizing government owes to former Western corporate owners of nationalized property. Analogous issues in the United States, following the civil rights legislative and judicial successes of the sixties, revolve around blacks securing increased influence and wealth relative to, among other things, land, banks, federal benefits, access to major markets, and participation in corporate power. Economic resource reallocation constitutes the frontier of legal development for black people, then, both internationally and in America, since in both communities black people have generally secured in legislative and judicial arenas important political and civil rights to be free from white-inspired racial discrimination. In both communities, it is a tense question whether the above rights will in effect be confirmed by necessarily concomitant rights for black people, as national and encapsulated groups as well as individuals, to enjoy realistic economic opportunities, wealth, and influence.

In exploring the rights under law of Afro-Americans to reparations from majority America, and in seeking partial guidance from major implemented European reparations plans,<sup>11</sup> Professor Bittker seems to sense this global tension between issues of equitable resource allocation and those of rational legal decisionmaking. In connecting with the above trends, this book continues a most timely inquiry about the role of law as the cutting edge of both national and international social change.

#### STRUCTURE AND ARGUMENTS

At the risk of some injustice to a book so rich in issues, it is useful here to briefly summarize its arguments. After stating the need for analysis instead of emotion relative to black reparations and his intention to provide it, Professor Bittker presents the case for compensation. The injustice for which compensation may be owed is not limited to slavery, nor to subsequent federal or state official misconduct, but extends to the "fallout of official action upon the economic, political, and social life of the country."<sup>12</sup> Black reparations "would serve to redress injuries suffered under a legal system that was held by *Brown v. Board of Education* to violate the Constitution."<sup>13</sup> But he is prepared as a

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<sup>11</sup> *E.g.*, BITTKER at 61.

<sup>12</sup> *Id.* at 24, 8-24.

<sup>13</sup> *Id.* at 23.

working hypothesis "to accept the theory that statutes, ordinances, and other official actions have been the predominant source of racial discrimination."<sup>14</sup> His willingness to accept that hypothesis stems from two reasons: first, we have no way of producing a model of the United States as it would have been if "unalloyed personal preference had been allowed full sway after slavery was abolished";<sup>15</sup> and second, this premise provides a justification for publicly financed reparations to the victims of discrimination, even though some of the damage may stem from "private" behavior that might have occurred in the absence of official encouragement or even in violation of official prohibitions.<sup>16</sup>

Because of the systematic, officially enforced nature of racial discrimination, Professor Bittker argues that the case for damages is not limited to judicially cognizable remedies but rather moves into the field of legislative discretion. Under the legislative approach it would not be necessary to find a constitutional right to compensation for governmental misconduct (though he rightly notes<sup>17</sup> that the traditional difficulty of overcoming this requirement in the judicial context may have been mitigated by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation*),<sup>18</sup> nor to require a comprehensive program of damages for every species of official misconduct.<sup>19</sup> Congress has in the past recognized equitable wrongs beyond those sanctioned by positive legislation and court opinions, and it might well use the ideal of "fair and honorable dealings" in passing on the reasonableness of the demand for black reparations.<sup>20</sup>

He then argues that a civil rights action under section 1983<sup>21</sup> is an example of existing law providing compensation for governmental misconduct that invades the citizen's constitutional rights; accordingly the concept of black reparations is far from bizarre or unprecedented. Although usually indemnity is paid for behavior that was wrong as judged by the generally accepted law when committed, it is quite possible to formulate legal strategies that go beyond this practice and redress injuries attributable to acts thought to be legal when com-

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<sup>14</sup> *Id.* at 25-26. In this connection, he finds racial discrimination institutionalized so continually in terms of violations of constitutional rights as to provide a potentially stronger claim than the case for compensating the victims of poverty or miscarriages of criminal justice. *Id.* at 24.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 20-21.

<sup>18</sup> 403 U.S. 388 (1971).

<sup>19</sup> BITTKER at 21.

<sup>20</sup> *Id.* at 22.

<sup>21</sup> 42 U.S.C. § 1983 (1970).

mitted, if they are condemned by a later change in legal or constitutional doctrine.<sup>22</sup> Applied to segregation, this latter approach would suggest the payment of compensation for state-prescribed segregation in public schools and other public facilities. Further, compensation for violations of the "separate but equal" doctrine is even more consonant with prevailing rules, since these violations were legally wrong even when committed.<sup>23</sup>

A program of compensation limited to actual violations of the "separate but equal" doctrine and to official segregation would be far from comprehensive. Millions of blacks who were not directly subject to formal segregation in the South felt the pervasive impact of official discrimination by the federal government and by states and other governmental agencies in the North. A program of black reparations that excluded these blacks would be unfair, but to include them would create still other problems. Individual reparations could not be provided by the government without an official code of racial classification, while group reparations would entail a process of official favor to some black organizations and disfavor to others. Because both routes are fraught with dangers, he uses the term "a second American dilemma" to describe the current situation.<sup>24</sup>

A thesis so wide-ranging raises many issues, in the words of Myres McDougal, of both public order and constitutive significance.<sup>25</sup> Given that it is impossible to even mention them all, our interest here is limited to selected issues of constitutive significance, *i.e.*, those illuminating the basic value arrangements of the community. This choice is considerably facilitated by Professor Bell's thorough critique of Professor Bittker's discussion of section 1983, the related cases, and especially the issues of standing, *i.e.*, the public order considerations.<sup>26</sup> Taking the book as a whole, Professor Bittker has anticipated the major and certainly most of the minor legal issues involved, giving the reader a

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<sup>22</sup> See Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 29 n.96 (1974).

<sup>23</sup> BITTKER at 135-36.

<sup>24</sup> *Id.* at 136.

<sup>25</sup> See McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73 (R. Falk & C. Black eds. 1969).

<sup>26</sup> Bell, *supra* note 1, at 158-62. Bell's basic objection is that Bittker passes too quickly over difficulties that threaten litigants' standing to bring damages claims under section 1983 before even getting to the merits, especially on the issue of reaching municipal officials for damages. From this discussion Bell concludes that section 1983 is becoming *less*, not more, promising as a basis of reparational relief against states. See in this connection the alternative bases of jurisdiction he suggests. *Id.* at 159 n.14. See also Collins, *supra* note 3, at 88-95.

sense of completeness and freedom to ponder his treatment of them, without the hindrance of first having to intellectually mop up after the scholar by raising missing issues. He does not provide a dispositive resolution of all of them, and therefore his argument for litigational purposes tends to be somewhat thin, as Professor Bell has noted.<sup>27</sup> On the other hand, it is intellectually valuable to lay out entire conceptions towards a desired goal in an integral form, notwithstanding the risks of collapse of some of its component elements. To the extent that one's view of the validity of intellectual inquiry adheres closely to that which must be rigorously and empirically demonstrated, Professor Bittker's willingness to push on beyond potentially fatal litigational pitfalls is utopian. But to the extent that his overall argument of legal feasibility is utopian, it may thereby help create what Professor Bell and implicitly all the reviewers have noted as the need for a sustaining vision to energize the legal process towards the goal of delivering reparations.<sup>28</sup> Obviously, however, if the argument suffers from too many flaws it may be too utopian to serve even the latter purpose; but that answer can await future inquiries.

Refreshingly, Professor Bittker has heeded some of the lessons, now a part of the Black Experience, of the long collective civil rights litigation and has confronted those legal arguments that would otherwise be especially useful to opponents of black reparations who cloak their opposition in appeals to higher constitutional principles. Thus he meets head on the argument that the one time legality of the *Plessy* doctrine provides a just rationale for now denying reparations;<sup>29</sup> he goes beyond the fourteenth amendment "state action" limitation instead of trying to torture that poor doctrine into the grave;<sup>30</sup> he quickly arrives at and disposes of the issue of voluntary black segregation as mitigating claims for reparations for white racial discrimination;<sup>31</sup> he confronts two likely first-line excuses as to why *no* reparations plan at all would be needed: "We will repeal the relevant unconstitutional laws," "We will quickly clean up conditions of existing discrimination";<sup>32</sup> he argues that school board members could validly be held to be on notice from the course of pre-*Brown* Supreme Court decisions and therefore had reason to believe, vis-à-vis a pre-*Brown* injury, that

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<sup>27</sup> Bell, *supra* note 1, at 157.

<sup>28</sup> *Id.* at 165.

<sup>29</sup> BITTKER at 22.

<sup>30</sup> *Id.* at 26.

<sup>31</sup> *Id.* at 28-29.

<sup>32</sup> *Id.* at 34.



segregation was legally improper as being "unequal" under *Plessy*, and accordingly could no longer shield themselves behind good-faith defenses;<sup>33</sup> with respect to a possible finding of state liability under section 1983, by reversing presumptions, he lays the basis for excluding as too speculative the inevitable protestations that the injury was wholly private in nature unaffected by any state behavior, or that other states contributed to the aggregate injury.<sup>34</sup> These points suffer from some of the difficulties raised by Professor Bell, but the important thing is that they are raised and discussed with some awareness of how contending anti-reparations forces will use them, instead of resort being had to a false neutrality that assumes the initial equal innocence of all claims.

#### A PREMATURE COMPLETION

Before continuing, it is pertinent to see what the book does *not* do, or at least what Professor Bittker did not intend it to do. Significant here is a comparison of the book's second chapter, "The Case for Compensation," with the last, "Black Reparations, Justice, and Social Welfare." In the former he explores the legal justification for making special claims on behalf of black people, concludes that such claims are not yet under present law barred by the passage of time, but notes explicitly that the entire inquiry presupposes an American society "that is prepared to respond to the most meritorious of these claims rather than dismissing all of them as man's ineluctable fate" (it is not clear here whether he refers to claims of past injustices generally, or of black reparations specifically).<sup>35</sup> The last chapter, on the other hand, finds that the massive national expenditures required for any program of reparations going beyond mere symbolism must inevitably compete with, and be weighed against all other demands on public funds in the federal budget. He then concludes:

In deciding whether black reparations should be given priority over education, foreign aid, or income support, and whether these government expenditures are preferable to lower taxes, the citizen must look to his own fundamental values. Moreover, since the amount that could be spent for any of these causes is elastic, he must go beyond a mere ranking of the categories by allocating dollar amounts to each line. If I were to offer such a budget to the reader without discussing the merits of each of the competing claims (a task beyond the intended scope of this work), it would be only an arbitrary presentation of my own social and political

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<sup>33</sup> *Id.* at 42-43.

<sup>34</sup> *Id.* at 65.

<sup>35</sup> *Id.* at 27.

preference, expressed in financial terms. I content myself, therefore, with the hope that this preliminary inquiry will aid the reader in fitting the concept of black reparations into his own hierarchy of values.<sup>36</sup>

This is a disappointing moment in the book. Having in effect based the book on the fundamental axiom of the ultimate defeat of racism in the American character by the realistic possibility of reparations actually being paid, he declines to explicitly test, or even speculate on the same point when he is inevitably led back to it, though elsewhere in the book he does engage in the kind of enlightened speculation and guesswork by which the best of scholars advance our understanding. It is disappointing because for Afro-America this is precisely the crunching, tension-and-rage-producing, generally debilitating dilemma: whether America is ultimately racist against black people, therefore necessitating the incorporation of certain stark inevitabilities into Afro-American expectations about the future, or alternately, whether indeed there is hope on which optimism and action can be based that black people will get what is justly theirs through some process of decision-making in the society. Most if not all concerted Afro-American thinking about both individual survival and public policy begins with this dilemma, and is followed by some inchoate or assumed provisional resolution of it prior to any consideration of subsequent issues. This dilemma is not and cannot be perceived by Afro-Americans as representing "just another" competing claim in the American political process; rather, it is the constant screen through which black people are forced to pull the entire process.

My hope was not for Professor Bittker to resolve it, but only to face it squarely in the same manner as he does most other issues in the inquiry, in his same announced spirit of stimulating a national debate. One stated aim of his quest was to see if lawyers using the tools of their trade could clarify the implications of black reparations.<sup>37</sup> It seems that if the question is transposed to ask whether the same people can use the same tools to clarify the fundamental assumption that underpins an inquiry into reparations, Professor Bittker's answer is negative.<sup>38</sup>

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<sup>36</sup> *Id.* at 135.

<sup>37</sup> *Id.* at 7.

<sup>38</sup> A judicial answer that closely relates to this question without actually answering it is beginning to emerge out of recent recession-relevant cases presenting the general issue of whether labor contract seniority provisions are superior to the law on equal employment opportunities with respect to the order in which an employer is to lay off and recall workers. A recent important decision on these issues, *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), held, *inter alia*, that Wisconsin Steel's (one of the joined defendants) employment seniority system embody-

Moreover, he eschews facing this dilemma in part for the wrong reasons. The practical effect of the "hierarchy of values" of the individual citizen is not nearly as crucial as is the ongoing exclusion of black people from critical national budget-making decisions. There is a real question as to whether an overt claim for effective black reparations would even survive long enough to reach the stage within the government where it would be honestly balanced on the merits against other national priorities, and have some minimum realistic chance of being included within the federal budget. It is this issue that could have been explored in manageable form as the logical next step, without getting into the morass of the merits of each budgetary item, and certainly without immediately and solely resorting to the individual consciences of people on the street. Such a discussion would have been a meaningful contribution to the needed national debate. As it is, a fundamental axiom of the inquiry remains hidden in its own ghetto.

#### THE CONTINUING UTILITY OF EQUAL PROTECTION

Chapters Ten, "Identifying the Beneficiaries," and Eleven, "The Constitutionality of Black Reparations" taken together present a question of some importance. In the former, Professor Bittker raises the issue of how to determine who is "black" for the purposes of effectively paying reparations. He notes that racial classification is not a new art in the American system,<sup>39</sup> and surmises that imperatives of rational administration might drive the federal government to adopt a formal code of racial classification similar to that in South Africa.<sup>40</sup> Such a code, he concludes, would be more likely to reinforce and sharpen polarization than to reduce racial separation because of the pressures generated by governmental intervention on this basis. It could lead to a "Balkanization of the racial map";<sup>41</sup> it would tend by virtue of official reliance on racial distinctions (*e.g.*, percentage of African blood) to pit subgroups of Afro-America against each other. While some of these problems might be alleviated by adopting a strategy of group rather

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ing the "last hired, first fired" principle of seniority is not of itself racially discriminatory, nor does it have the effect of perpetuating prior racial discrimination in violation of Title VII, but that it might have "potentially discriminatory impact," and that an amending agreement reinstating contract recall rights to three white workers was discriminatory. *Id.* The Supreme Court has recently granted certiorari in another case hopefully to resolve the conflict between such seniority systems and Title VII. *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), *cert. granted*, 95 S. Ct. 1421 (March 25, 1975).

<sup>39</sup> BITTKER at 93.

<sup>40</sup> *Id.* at 97.

<sup>41</sup> *Id.* at 99.

than individual reparations, such a strategy is ultimately unequal to the task because, for various reasons,<sup>42</sup> it would require a host of arbitrary choices among organizations competing for participation.<sup>43</sup> If his discussion has a germ of truth within it, his dilemma may apply to both majority and Afro-America:

It is the justice of reparations when viewed in the large, coupled with these perils of administering a program in the concrete, that lead me to perceive this area as the focus of the second American Dilemma.<sup>44</sup>

In chapter Eleven, Professor Bittker asks: does the Constitution permit the federal government to establish and finance a program of reparations whose benefits would go to black citizens exclusively? The resulting stimulating discussion begins with the notion of a "colorblind" Constitution, and includes the discussion of three pre-*Brown* hypothetical appellate opinions on the constitutionality of a "checkerboard" housing ordinance that are contrasted with post-*Brown* issues and problems.<sup>45</sup> Chief among the latter is the propriety of racial distinctions and percentages in governmental action, especially following *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>46</sup> He holds out some hope that while the Supreme Court might forbid the courts to make the necessary racial distinctions directly,<sup>47</sup> it "might well hold that a program of black reparations was within the discretionary authority of the people's representatives."<sup>48</sup> Doubts as to this eventuality remain, however, which stem from the failure of the Supreme Court thus far to seize "the nettle of individual racial classifications."<sup>49</sup> A second doubt stems from his conclusion

that the program, even if otherwise constitutionally acceptable, would have to be corrective, imposing racial restrictions only to cure the evils stimulating their adoption. This would imply that the program's benefits, time scale, and other characteristics would be subject to a residual power of judicial review lest its racial qualifications outlive their justification.<sup>50</sup>

He concludes the time is distant indeed when this latter action could

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<sup>42</sup> *Id.* at 100-01.

<sup>43</sup> *Id.* at 102-03.

<sup>44</sup> *Id.* at 104.

<sup>45</sup> *Id.* at 109-15.

<sup>46</sup> 402 U.S. 1, 22-25 (1971); BITTKER at 116-17.

<sup>47</sup> BITTKER at 121.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 125.

<sup>50</sup> *Id.* at 125-26.

justifiably be taken, though, should it happen, "a judicial verdict rejecting the program's constitutionality would not be a judgment on its fairness or wisdom."<sup>51</sup> Inevitably, however, in my opinion, it would indeed be overwhelmingly perceived by the American public as such a judgment.<sup>52</sup>

These two chapters raise squarely the question of the continuing utility of the equal protection clause of the fourteenth amendment to the critical concerns of Afro-America, especially as that clause retains at its core the concept of a "colorblind" Constitution. This concept is rightfully and inevitably to be illuminated by both the earlier slave-holding version of the same Constitution, and with the history of harm to black people from almost 400 years of racism in this country. Has that concept outlived its judicial and litigational utility to black people when it now threatens to block the transfer of resources to Afro-America which are theirs under a claim of justice?<sup>53</sup>

To his credit, Professor Bittker perceives this question of utility on both its strategic and constitutional merits. Thus in discussing color-blindness in the Constitution on the basis of Justice Harlan's dissent in *Plessy* as endorsed in *Brown v. Board of Education*, he asks:

Can these generalizations, founded on the equal protection clause of the Fourteenth Amendment and also on a more basic theory of democracy, be squared with racial distinctions having a compensatory purpose? Or do they confine governmental actions to the elimination of racial disparities for the future, requiring us to let bygones be bygones?<sup>54</sup>

The issue is more precisely drawn at the conclusion of chapter Eleven:

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<sup>51</sup> *Id.* at 126.

<sup>52</sup> An indicator in this respect is the recent shift following *DeFunis v. Odegaard*, 416 U.S. 312 (1974), dampening public support for compensatory higher education admissions opportunities for minorities.

<sup>53</sup> Alternatively, the related issue could be raised of whether recent affirmative action decisions, some of which Professor Bell has called "quasi-reparational," Bell, *supra* note 1, at 164, under the equal protection clause represent a trend of interpretation culminating in a clause ultimately supporting reparations payments (at least in case-by-case litigation) to black people *per se* while somehow still justifying it under remnants of a colorblind principle. The plausibility of this eventuality is the rightful subject of a separate extensive inquiry, see note 58 *infra*, and no opinion is expressed on it here. However, if we assume that the clause does ultimately acquire such an interpretation, the possibility arises of a then subsequent and early federal judicial "backlash" whittling down the clause from that principle, perhaps down towards a new interpretation of "color blindness" promising less constitutional support for reparations to black people exclusively. Arguably, a semblance of this "backlash" has occurred vis-à-vis black people with respect to state action under the fourteenth amendment. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); cf. D. BELL, *supra* note 4, at 219-57.

<sup>54</sup> BITTKER at 108.

In Chapter 10 I set out my misgivings about the use of a racial code and individual racial classifications in a program of black reparations, as well as my parallel doubts about the use of black groups as conduits or intermediaries. If these dangers are as substantial as I have suggested, they would not be eliminated by a judicial decision upholding such a program's constitutionality.<sup>55</sup>

This returns us to the earlier discussion of the dichotomy between reparations as an idea of law and as an idea of justice.<sup>56</sup> It does so especially if we take Professor Bittker's arguments in these two chapters as being more often than not correct when he states that to implement a program of individualized reparations would require some kind of formal federally-administered racial code that in turn ultimately would produce more injustice and oppression than currently obtains, regardless of its constitutionality. Whether or not he is right is the core of the dilemma for black lawyers and Afro-America generally.

It is a commonplace that the due process and especially the equal protection clauses have served Black America well in the courts in this century, though the road yet to travel is long. We may go further, even, to say that these provisions have served as both a bulwark in selected areas against worse racial abuse, and as a sword to help selectively eliminate racism long entrenched.<sup>57</sup> The notion of an ultimately colorblind equal protection clause should not be given up, until it is as clear as possible that what is to be gained is not only immediately greater but promises to endure at least as long as has the utility of the clause as "colorblind." Does the prospect (or the certainty) of a program of federally funded black reparations meet this test?<sup>58</sup>

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<sup>55</sup> *Id.* at 126-27.

<sup>56</sup> See Hughes, *supra* note 4, at 1066-69, discussing justice to black people in this regard on the basis of earlier work by John Rawls centered around the notion of fairness in a social contractual context. Rawls, *Justice as Fairness*, 67 *PHILOSOPHICAL REV.* 164 (1968).

<sup>57</sup> See generally Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 *HARV. L. REV.* 1532 (1972).

<sup>58</sup> There is here the underlying question of whether at this point there still remains any "neutral" or "colorblind" considerations within the principle of equality in American law to give up, should a system of black reparations come to be instituted. One argument to the contrary might hold that the lack of effective enforcement of *Brown* and post-*Brown* decisions illustrates the impossibility of even theoretically talking about equality for Afro-Americans. I would agree with the underlying premise that equal protection has only been sporadically enforced in fact, but would maintain that the existence of the theoretical principle on the constitutional level and in federal statutes, and available therefore as the basis of numerous Afro-American counterclaims against business-as-usual, has in that respect kept Afro-America from being as legally vulnerable as it might otherwise have been to racist practices. Things could always be somewhat worse.

A second argument to the contrary might be that *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in precluding use of employer evaluations with a discriminatory impact,

The definitive answer as to Professor Bittker's assertion that the payment of reparations on other than a group basis necessitates the imposition of a racial code on the South African model obviously cannot finally be determined here. But it is little wonder that this is a point on which the reviewers have manifested their impatience. Professor Guinier, for example, feels that the necessary racial classification could be successfully done by a series of administrative boards plus some expanded concept of legislation as proposed by Professor Bittker, on the basis of general analogies to present affirmative action programs;<sup>59</sup> Ms. Collins goes further to advocate an agency similar to the Indian Claims Commission, in conjunction with federal referees.<sup>60</sup> Professor Shepard might subscribe in spirit to both on the theory that whatever errors arise will be marginal and inconsequential.<sup>61</sup> One problem with these formulations is that raised for different purposes by Professor Guinier himself: that present affirmative action criteria, especially for the transfer of economic resources, are currently generally

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has generally abrogated "neutral" or "colorblind" considerations from the principle of equality. Therefore the issue is no longer about giving up the same for the purposes of justifying reparations, but only about what variety of racial standard is constitutionally or otherwise desirable.

If this interpretation is adopted, it becomes relevant to note that there has not yet been promulgated the kind of racial code suggested. One accordingly could argue that dropping the neutral, colorblind core of the principle of equality does not inevitably—at least in the short run—lead to the adoption of such a racial code. On the other hand, no reparations program has yet been proposed by the federal government in the context of which such a racial code would likely arise.

But *Griggs* does not appear to abrogate the colorblind principle. If anything, that decision attempts to retain at least a remnant of the same by on the one hand rejecting the business-as-usual argument that discrimination occurs only where there is intent to do so, and on the other hand by resorting to the "neutral" principle of job-related evaluation, should employer evaluation otherwise allowed under the EEOA have apparently discriminatory impact, to ensure that the congressional intent to make race, religion, nationality and sex irrelevant is carried out. *Id.* at 436. To be sure, the Court acknowledges implicitly that past discrimination can be taken into account in interpreting the Act, *id.* at 431, and the effect of this decision is to put some additional black workers into more jobs. In this connection, Professor Bell cites *Griggs* for being among the cases having "quasi-reparational effects," Bell, *supra* note 1, at 164 n. 36, but then draws a distinction between those effects and "direct reparations." *Id.* at 165. It is a valid distinction and the latter can be taken as the main topic of inquiry here.

Accordingly, it seems on balance that the principle of equality in the decisions of the Court remains at least theoretically subject to "colorblind" considerations which would be called into question by "direct" reparations for black people, and hence the issue of the costs to Afro-America of giving up this principle for any benefits of reparations remains a valid one.

<sup>59</sup> Guinier, *supra* note 1, at 1722-23.

<sup>60</sup> Collins, *supra* note 3, at 88-89. But see BITTKER at 73-78.

<sup>61</sup> Cf. Shepard, *supra* note 1, at 590.

drafted in nonracial terms perhaps to mean black people but which, intended or not, wind up covering many poor whites and other deprived citizens.<sup>62</sup> This would generally be impermissible under a program to pay *black* reparations, though it is consistent with an equal protection clause still colorblind in theory. Not only, therefore, is there a difference in legislative strategy between affirmative action and black reparations but a difference in the basic objective for which payment is made, rendering such facile analogies suspect.

Professor Bell, however, raises the objection to Professor Bittker's analysis that self-certification in lieu of a racial code would indeed be workable. Few if any whites would fraudulently identify themselves as black because "[t]he economic, social and psychological benefits of whiteness in this society are highly valued by whites" and are unlikely to be sacrificed for participation in any black reparations program.<sup>63</sup> This is true enough as far as the merits are concerned, but ignores the imperatives that seem to motivate legislatures and courts based on their assumptions about the possibility of fraud, some of which frankly approach paranoia, when the dispensation of money especially in programs of direct human benefit is at stake. If sums of at least \$30 billion are to be involved in any reparations program not merely symbolic, an almost inevitable demand by the payor is going to be for an elaborate definition of some kind setting out who is or is not entitled to be paid, with as much precision and consistency as possible. Past experience indicates that this demand operates independently of the merits as to whether it is actually needed or makes sense.<sup>64</sup> Self-certification might indeed be workable, but it seems fanciful to think that any legislature would agree, absent tremendous political pressure.

#### THE MEANING OF THE SOUTH AFRICAN MODEL

This leaves us, then, with the suspicion that Professor Bittker's point has at least a germ of validity for payment of individualized reparations, and that it might even be relevant for payment to racially identifiable groups. If we proceed on this basis, the South African model,

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<sup>62</sup> Cf. Guinier, *supra* note 1, at 1723.

<sup>63</sup> See Bell, *supra* note 1, at 163.

<sup>64</sup> A cogent example of this demand is found in the rationale underpinning Guest Statutes—that the passenger-plaintiff and the driver-defendant would more likely than not "collude" in staging a "safe" accident for the purpose of fraudulently collecting insurance money in a situation necessarily unwitnessed by third parties; therefore, Guest Statutes are needed to prevent such "probable" collusion.



although its applicability was generally rejected by the reviewers, must be reexamined. Should we take the model seriously enough for it to serve as one criterion for evaluating the feasibility of any proposed reparations program, and for aiding Afro-America to decide whether proffered federally funded reparations payments on a national scale should be accepted, if the tradeoff includes the rejection of the jurisprudential principle of "color-blind" equal protection?

As inconvenient as it may be, the answer is yes. The history of South Africa shows the relentlessly logical use of a system of racial classifications by a white minority employing the legal system as a primary strategy<sup>65</sup> to subjugate black people for the easier exploitation of their labor under conditions close to those in slavery and to divert them from the economic, landed and social benefits of the society. This apartheid system has been continuously justified by white South Africa as a program of "separate development" for the "benefit" of the black African peoples because of the "cultural disparities" involved. Its pervasive racial oppression includes legal policies regulating individuals (the "Pass laws") and groups (the "homelands policy"),<sup>66</sup> and is consolidated by a strong army and police force, a fully mobilized local white militia, plus one of the most brutally effective internal security systems in the world.<sup>67</sup>

There is some visible emphasis internationally, and to a lesser extent in Afro-America, on formulating legal strategies to facilitate the downfall of South Africa's domestic and exported (to the international territory of Namibia) system of apartheid. Exported apartheid clearly violates international law, as a recent decision of the International Court of Justice holds.<sup>68</sup> But Pan-African solidarity by no means exhausts the legitimate interest of Afro-America in South Africa. Equally important is gaining an understanding of apartheid to ascertain the conditions under which similar oppression could arise in other countries, including the United States, and especially an understanding of the role of legal process in preparing and consolidating the foundation for such

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<sup>65</sup> A. MATHEWS, *LAW, ORDER AND LIBERTY IN SOUTH AFRICA* 298 (1972). Mathews' entire book, in fact, inquires into the use by white South Africa of the legal system to maintain a highly authoritarian apartheid state.

<sup>66</sup> *Id.* at 240-52.

<sup>67</sup> *Id.* at 299-301.

<sup>68</sup> Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

pestilence.<sup>69</sup> The South African example stands at a minimum for the premise that an expressly racial designation enshrined in constitutive national expectations about the allocation of power and wealth benefits in the society can very effectively be turned into a rationale for oppressing its putative beneficiaries, at least if the lawmakers are white and the "beneficiaries" are black. There are strong indications that one necessary if not sufficient condition for the effectiveness of this oppression as aided by legal process is the absence in South African law of a constitutional principle of equality.<sup>70</sup>

To dismiss the problem as of no consequence is to assume that somehow "it can't happen here." There would seem to be no historical or present justification for such an assumption, though we can debate the probabilities and fervently hope that it does not. But to embrace the concept of a national racial classification as a matter of constitutional law on this basis is to assume that the white majority in the United States, if given the same doctrinal tools of law vis-à-vis the black minority, would be destined to act in a qualitatively different manner from the white minority in South Africa vis-à-vis the black majority. The only basis for this assumption is a hope that it would be different, a hope imperiled by past and recent attempts by some American law enforcement officials looking to link black political and criminal behavior and then to treat it as a threat to the internal and external security of the country.

The point is not to answer here whether the future will violate these hopes, but only to emphasize that the South African example should be taken seriously enough so that the desirability of a national code of racial classifications, if that subsequently appears inevitable, should be the subject of much informed and searching inquiry.

In this connection, recent developments in the law of the international protection of human rights provide additional harbingers of difficulties. John Carey has aptly pointed out that the South African apartheid example has become the subject of a double standard in that

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<sup>70</sup> *Id.* at 279-80.

<sup>69</sup> See A. MATHEWS, *supra* note 65, at 279-80, for his discussion of the relationship between apartheid and the absence of a jurisprudential principle of equality in South African law; see also *id.* at 295-96 for a useful discussion of the objectives of the general apartheid policy. And see *id.* at 115-32 for a comparative discussion of the constitutional latitude of American versus South African courts relative to striking down or modifying internal security legislation, especially the necessity of the former to "balance" state interests against the preservation of individual liberties, a necessity prohibited from South African courts.

area of the law.<sup>71</sup> The relevant question is whether domestic (within national boundaries) violations of human rights are shielded from international inquiry by Article 2(7), the domestic jurisdiction provision of the United Nations Charter.<sup>72</sup> The emergence of the law on point has largely focused on the South African problem of apartheid, so that it is reasonably clear that apartheid is not shielded by Article 2(7). But in the process a distinction recommended as a matter of law has emerged between apartheid and other forms of racial discrimination, in the form of arguments that the South African case is *sui generis* for the purposes of Article 2(7), which provision accordingly remains intact for shielding other varieties of racial discrimination from international inquiry in other discriminating countries.<sup>73</sup> The attempt is to make South Africa somewhat of a legal whipping boy to forestall more expansive interpretations of Article 2(7). Western, including Soviet, political convenience obviously plays a major role here, and some third-world countries share the same convenience. Such arguments cannot be now said to have attained the status of a principle of international law. The lesson for our purposes, however, is that the enshrining into legal process of assumptions that South African apartheid "can't happen here" may well produce presumptions of law cutting against inquiry into, and abolition of, other varieties of racial discrimination against black people in other contexts under the jurisdiction of the same legal system. The emergence of such *sui generis* conclusions of law would appear undesirable from the vantage point of Afro-America securing maximum protection within American legal process, yet this would seem to be the net effect of adopting a code of racial classification under the fourteenth amendment.

#### DISCHARGE OF OBLIGATIONS BY PAYMENT OF REPARATIONS

If after due deliberation of the foregoing issues we assume that reparations conceivably might be paid, an equally important consideration remains. The question of which obligations formerly owed to Afro-America by majority America will be expected by the latter to be acknowledged as discharged is significant in that it focuses on the post-reparations future of Afro-America. This consideration arises

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<sup>71</sup> J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS 143-53 (1970).

<sup>72</sup> The provision reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the

whatever the rationale for reparations: damages paid for past tortious wrongs, redress made for prior uncompensated benefits to majority America analogous to unjust enrichment, or compensation for property deprived without due process of law.<sup>74</sup> The related question is how, after reparations are paid (or during the period that they are being paid), obligations of majority America to Afro-America will as a matter of law and policy differ from pre-reparations obligations and expectations. These questions have not been raised by Professor Bittker nor his reviewers, but they are critical for clarifying community expectations of both law and justice in this area of inquiry.

Analysis of this question raises the basic issue of whether reparations should be accepted by Afro-America even if they are offered. This is different from asking whether reparations under basic standards of justice and fairness are *owed*.<sup>75</sup> It does not *necessarily* follow from that premise that once owed they should automatically be accepted. There is the possibility that, once obligations were considered discharged upon acceptance, a new relationship between black people, as a people and as individuals, and America would result that might produce more oppression than currently exists. I note no diminution of the basic obligation of reparations because of this possibility, nor do I recommend that such reparations not be accepted. But the potential ramifications of the acceptance of such offered resources is a separate issue that must be decided on its own merits.

Most of the reviewers manifested great and understandable impatience with Professor Bittker's work, stemming from their commitment to the premise of reparations being paid, and from their frustration with the problems that he raises relative to implementing the same.<sup>76</sup> Some impatience showed in statements implying that his inquiry in the final analysis constituted one more example of obstructionist reasoning as to why yet again America could not, for "good" reasons, fulfill its obligations to black people.<sup>77</sup> These were coupled with further

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present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

<sup>73</sup> J. CAREY, *supra* note 71. Cf. McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

<sup>74</sup> See notes 81-89 *infra* & text accompanying. See also Collins, *supra* note 3, at 96-113.

<sup>75</sup> As should be clear by now, I subscribe, as do all of the other reviewers to date, and implicitly Professor Bittker, to the proposition that such reparations are owed.

<sup>76</sup> See Bell, *supra* note 1, at 156-57, 165; Guinier, *supra* note 1, at 1722-23; Shepard, *supra* note 1, at 589-90.

<sup>77</sup> See Bell, *supra* note 1, at 165.

observations to the effect that since America has been operating more or less successfully on the basis of administering racial distinctions implicitly and explicitly for the past 400 years, it should present little problem to find a workable scheme for paying reparations, especially if the requisite political voltage is mobilized behind the effort.<sup>78</sup>

In terms of the actual contexts in the American political arena in which Professor Bittker's discussion of the problems are likely to be invoked, such impatience is likely well-founded, though recent judicial decisions awarding significant reparational payments to specific groups of black and women workers must be considered.<sup>79</sup> But the above issue of whether reparations should be accepted by Afro-America simply because they are owed and offered stands, whether the grounds for such impatience prove true or not. It stands because of the inevitability of a post-reparations change in the relationship between majority America and Afro-America, and because of the possibility that their payment could serve as the foundation for a new system of dependency more onerous than before on Afro-America vis-à-vis the federal government and majority America.<sup>80</sup> This of course is not to say that such a dire possibility will inevitably come about, but only that the payment of reparations is not an innocent act, should not be assumed as such, and that this issue should be included as an integral part of the debate that Professor Bittker is calling for throughout the nation, and especially in the councils of Afro-America.

#### ACCEPTANCE AND THE BASIS FOR REPARATIONS

It is obviously impossible to resolve here the issues involved in the acceptance of national reparations payments, and no such attempt is being made. But it is equally obvious that those issues relate directly to the rationale of such reparations as are proposed: for which past wrongs would reparations be seen as compensating Black America? Professor Bittker discussed this question at some length, and his conclusions warrant our attention.

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<sup>78</sup> See Shepard, *supra* note 1, at 589-90; cf. Bell, *supra* note 1, at 157-58.

<sup>79</sup> E.g., *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd in part on other grounds sub nom.* *EEOC v. Detroit Edison Co.*, 2 CCH EMP. PRAC. GUIDE ¶ 9997 (6th Cir. Mar. 11, 1975); *Agreement, A.T.&T., E.E.O.C. & United States Dep't of Labor*, 1 CCH EMP. PRAC. GUIDE ¶ 1860, at 1533-3 (Jan. 18, 1973).

<sup>80</sup> Lessons from systems of dependency established by foreign aid programs of the United States and other industrialized nations to developing countries, and from the trade-off incorporated in American urban welfare programs of detailed state regulation of one's personal life as a condition of receiving material benefits, cannot be ignored in connection with reparations payments.

Are reparations owed for the subjection of black people to slavery prior to the Emancipation Proclamation? For various reasons Professor Bittker concludes that reparations claims must basically rest on more "recent" abuses to black people subsequent to the formal termination of slavery.<sup>81</sup> This conclusion has its unfortunate implications because, as Professor Bell has correctly noted, the exclusion of slavery from the basis of reparations deprives the entire general claim of a considerable amount of moral force.<sup>82</sup> This exclusion furnishes an additional touchstone of the distinction between considerations of law and those of justice, since the reasons for excluding slavery are largely those of preserving the possibility of making a valid claim in law for wrongs subsequently committed.<sup>83</sup> In any case, Professor Bittker's discussion implies that obligations owed to black people for their treatment *during* slavery would *not* be discharged by payment of reparations, while simultaneously implying that such obligations might well not be perceptible under current American law and therefore under any program of reparations administered through that law.

The decision to concentrate the search for compensable wrongs in the post-slavery period leads to further issues as to the exact actions to be causally related to such wrongs. As noted previously, Professor Bittker adopts, as a working hypothesis, the proposition that statutes, ordinances and other official actions have been the predominant source of racial discrimination.<sup>84</sup> We may suspect, should large sums of money be involved, that arguments will be made by the payors that *all current injury* stemmed from official actions, and that paying reparations discharges any obligation to further compensate for *any* harm either attributable to the period prior to the cut-off date or currently existing on that date. Professor Bittker's formula does not take explicit account of the persistent fourteenth amendment problem of finding some legal rationale to compensate for purely private actions of anti-black discrimination, as he has implied in another context,<sup>85</sup> and as was further noted by Ms. Jenkins in her review.<sup>86</sup> It follows that, notwithstanding the

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<sup>81</sup> BITTKER at 10-12. It may also make a considerable difference in the actual amount owed. For example, a black group and an economic historian separately calculated the present day value of "unpaid black equity in the slave industry" at between \$448 and \$995 billion. *Id.* at 9.

<sup>82</sup> Bell, *supra* note 1, at 158.

<sup>83</sup> BITTKER at 9-26.

<sup>84</sup> *Id.* at 26. See text accompanying notes 12-23 *supra*.

<sup>85</sup> BITTKER at 26.

<sup>86</sup> Jenkins, *supra* note 1, at 248.

payor arguments, the obligation of majority America to compensate Afro-America for injury from purely private actions might not be discharged by the official payment of reparations. As was noted previously, Professor Bittker confronted this problem by arguing for a shifting of the burdens of evidence and pleading to link private actions to official behavior.<sup>87</sup> There is substantial doubt as to whether this strategy would be strong enough to stave off much acrimonious debate as to what *current* injury stemmed from past official versus past private actions, in part because any identity between private and official actions could be used to support payor's argument that compensation by officials discharges obligations for harm by private actions. Should this debate become the focal point the situation would not be much advanced beyond where it is today.<sup>88</sup> Further, to the extent that Professor Bittker's working hypothesis and subsequent conclusions hold up,<sup>89</sup> the upshot could be another case of an obligation owed in justice for injuries from private actions before the cut-off date, but not perceptible under any law by which reparations would be administered.

To the extent that Professor Bittker advocates reparations as a federal task most appropriate for congressional solution, there are further possibilities stemming from his suggested congressional standard of "fair and honorable dealings."<sup>90</sup> In addition to the discharge of obligations problem the question of activities by private persons still remains, though Professor Bittker's suggestion in this regard is pertinent. "Fair and honorable dealings" is a more inclusive standard than "official actions," meaning that the range of past injury claimed to be compensated for will be wider, the list of discharged obligations more complete, and the presumption stronger that Afro-America is on an even par with majority America subsequent to the payment of reparations. If this presumption becomes the subject of judicial and legislative notice as a matter of public policy in post-reparations decisionmaking, subsequent federal and state policies towards Afro-America would be harsher than today to the extent that the actual injury done over the course of almost 400 years to black people and the post-reparations

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<sup>87</sup> See text accompanying note 35 *supra*.

<sup>88</sup> But see Professor Bittker's suggestion on this point that private action would be linked to official action under a "fallout theory." *Id.* at 24-25.

<sup>89</sup> The best analysis of Professor Bittker's discussion of cases is found in Bell, *supra* note 1, at 158-62; see also Guinier, *supra* note 1, at 1720.

<sup>90</sup> See text accompanying note 21 *supra*.

continuing consequences thereof are in fact unaccounted for in the calculation of payments to be made. Such an accounting would arguably be hindered as much as aided by the vagueness of the congressional standard. An obligation to compensate would remain, but the legal process would be foreclosed from meeting it. This possibility would seem to put a premium on an accounting method for calculating the injury done and thus the amount owed, which rests on some notion of historical determinism rather than on more discontinuous or eclectic theories. But eclecticism rather than determinism appears to predominate in American historiography, raising the further possibility of such a reparations methodology being attacked as invalid and having therefore to be defended as valid for this particular purpose.

#### CONCLUSION

The rich stimulation of Professor Bittker's work is valuable not only, as suggested by Professor Bell, as a path for inquiry once—or if—the nation moves politically to decide that reparations are owed and should be paid,<sup>91</sup> but also because of two additional factors. First, the book as a legal inquiry about a potentially massive reallocation of resources from the "haves" to a group of "have-nots" links Afro-America by yet another tie to analogous international trends. This linkage contributes to greater ultimate understanding in projecting future alternatives for Afro-America. And secondly, the weakness of the book in incompletely exploring the dichotomy between law and justice relative to reparations, plus its strength in systematically raising the issues of logic, law, and public policy that must be faced in one form or another if reparations are to mean more than a few tokens, both serve very well to remind all American citizens that reparations, no more than any other single "solution," are neither the Messiah leading to the Promised Land nor the definitive national "program" to eliminate injustice between black and white people. Such ease is not of this world.

The national debate called for by Professor Bittker began as early as 1829,<sup>92</sup> but his work suggests that majority Americans in positions of authority might become ready to listen. "Debate" is somewhat a misnomer here, for it implies that the loser will accept defeat with equanimity or at least retain the belief that the rules were fair. As the reviewers have well shown, however, the question of the real priority

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<sup>91</sup> Bell, *supra* note 1, at 165.

<sup>92</sup> Guinier, *supra* note 1, at 1721.



of black reparations within the national framework is far more compelling than is implied by reducing it to one of comparative budgetary expenditures. It goes to the very idea of Afro-America, and therefore tests the idea of America, and not least that of law doing justice in America.